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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1957**

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## No. 178

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JOHN RUSSELL CROOKER, JR.,

*Petitioner,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

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## PETITIONER'S OPENING BRIEF

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*To the Honorable Earl Warren, Chief Justice of the United States of America, and to the Honorable Associate Justices of the Supreme Court of the United States:*

This is an appeal to the Supreme Court of the United States pursuant to the order of the United States Supreme Court granting certiorari to the State of California. The defendant was convicted in the Los Angeles Superior Court of the murder of Mrs. Norma McCauley on July 5, 1955. The Supreme Court of the State of California affirmed the conviction with Justice Carter dissenting (*People* v. *Crooker,* 47 Advance Cal. 354, 303 Pacific Second 753). This Court granted certiorari limited to two questions as follows:

1. Was the defendant denied due process of law by the refusal of the investigation officers to allow him to con-

sult with an attorney upon demand being made to do so while he was in custody?

2. Was the defendant denied due process of law by the admission into evidence of a confession which was taken from him while in custody and after he had been in such custody for fourteen hours and had not been allowed to consult with his attorney?

## Factual Statement

Norma McCauley was found by her children in the bedroom of her home on the morning of July 5, 1955. She was found to have been stabbed and strangled with the stabbing attributed as the principal cause of death and strangulation as the secondary cause of death. Transcript of Record, page 2.

John R. Crooker, Jr., the appellant herein had first met Mrs. McCauley in the summer of 1953 when he was a student at the University of California at Los Angeles Law School and sought employment from Mr. and Mrs. McCauley as a houseboy in order to defray his expenses while attending the University. Transcript of Record, page 442. This relationship had terminated prior to the date of the murder, but a personal relationship between the defendant and the deceased which had originated during the employment continued until a time shortly before her death. This relationship had been kept secret from Mrs. McCauley's friends and family although it was a warm and intimate relationship as disclosed by the affectionate letters written to the defendant from the deceased (see defendant's Exhibit "I"). The defendant was arrested in his home at approximately 1:30 p.m., of the 5th of July, Transcript of Record, page 129, and was held in custody continuously until approximately 3:30 a.m., of the 6th of July at

which time the defendant wrote in his own handwriting a purported confession of the murder of Mrs. McCauley.

There was considerable conflict as to what happened during the fourteen hours that intervened between the defendant's arrest and the writing of the purported confession. The defendant's version as contained in the Transcript of Record, pages 138 to 162, was as follows:

That on July 5, 1955, he was in his apartment at approximately the noon hour and was wearing pajamas, robe and slippers. That upon hearing a key inserted at his lock, he stood up at his desk and moved to the center of the room whereupon the door was opened and two police officers identified as Officers Krueger and Jackson of the Los Angeles Police Department burst into his room with drawn guns and demanded he put up his hands. After searching him, they placed handcuffs on his wrists and informed him he was under arrest and charged with a felony and that it was a serious matter, and that other officers would be over to question him regarding it. The defendant asked if he would be allowed to call an attorney and the officers replied that he would have an opportunity. A few minutes later two detectives from the Los Angeles Police Department arrived, who were later identified as Sergeant Jack Gotch and Officer William Stambler. They removed the handcuffs of the other police officers and placed their own handcuffs on the defendant, and commenced a search of the apartment. Crooker testified that he asked these officers if they had a search warrant, and they replied that they did not need a search warrant, Transcript of Record, page 141; he further testified that he asked these officers if he could be allowed to call an attorney. Sergeant Gotch did not reply to the inquiry regarding an attorney but placed a telephone call from the defendant's apartment, apparently seeking authority to conduct a search of defendant's apart-

ment. After the telephone call was made, a search of the apartment was made, and other persons arrived whom the defendant testified were not introduced to him by name but who were later identified as Lieutenant Grover Armstrong, Inspector Henry W. Kerr, Mr. Ray Pinker of the Crime Lab of the Los Angeles Police Department, Captain Warren N. Stilson and Chief Assistant Deputy District Attorney Adolph Alexander.

After the defendant's apartment had been thoroughly searched, and his clothes had been examined, he was asked if he owned an automobile and replying in the affirmative, was asked for the car keys. Transcript of Record, page 145. He gave the car keys to one of the officers and some of the men in the apartment left to return later bearing a manila envelope later identified as defendant's Exhibit "I", which contained approximately thirty or forty letters from the decedent to Crooker. Transcript of Record, page 150.

The defendant further testified that he was later taken to the Central Station of the Los Angeles Police Department in downtown Los Angeles and there was taken to the Polygraph Room and asked to submit to a lie detector test. The defendant testified that he then had a conversation with Officer Raymond C. Willis and that he informed Officer Willis that he did not wish to take the lie detector test at that time but would be willing to take the lie detector test if allowed first to consult with his attorney. Transcript of Record, page 152. The defendant testified that this request of his was refused. The defendant further testified that while at the Central Police Station he had further conversation with Sergeant Gotch regarding an attorney, and that he asked specifically to be able to consult an attorney at that time, and this request was refused.

The defendant further testified that while at Central Station he had a conversation with Lieutenant Armstrong

and asked Lieutenant Armstrong if he would be allowed to consult an attorney. The defendant testified that he further asked Lieutenant Armstrong if force would be used upon him to make him admit things before he were allowed to consult with an attorney, and the defendant testified that Lieutenant Armstrong replied, "This is a free country," Transcript of Record, page 158. Defendant testified, "I know that." Then he said he asked him again if he was going to use force to make the defendant answer all the questions and Lieutenant Armstrong replied, "You don't have to say anything that you don't want to." Transcript of Record, page 158. The defendant testified that during the periods of time that he was questioned by Sergeant Gotch, Officer Stambler, Sergeant Hooper, and Lieutenant Armstrong that he repeatedly asked for an opportunity to consult with counsel and informed them that he did not wish to answer their questions until he had had an opportunity to consult with counsel.

Defendant testified that he was next taken to the West Los Angeles Division of the Los Angeles Police Department, and upon arriving there at approximately 10:30 P.M., Transcript of Record, page 158, the questioning continued. The defendant testified that during the questioning by the various officers that he was told by the officers that he had stabbed and strangled Norma McCauley and that he had been "shaking her down" to obtain money from her and that he had killed Norma McCauley. He testified that the officers informed him that Kirk had discovered Norma McCauley's body and that he was questioned by the officers as to whether or not he had stabbed Mrs. McCauley or whether or not he had strangled Mrs. McCauley. The defendant testified further that throughout the inquiry he had asked all of the officers examining him from time to time if he could consult with an attorney.

The defendant testified that about two o'clock in the morning Sergeant Hooper was questioning him and suddenly jumped up and struck the defendant on the knee. Transcript of Record, page 161. At this point the defendant testified that he turned to Lieutenant Armstrong and said, "There, you see," and Lieutenant Armstrong said, "What do you mean?" Defendant said, "They are going to use force to make me answer their questions before I have an attorney." The defendant testified that at this time Lieutenant Armstrong said nothing but went on out of the room, whereupon Sergeant Hooper said, in substance, "Look, you son-of-a-bitch, I have been in this work for sixteen years and I'm not going to let someone like you come in here and tell me that he's not going to answer questions. You're going to tell us what we want to know, and you're going to tell us now." And with that, Sergeant Hooper struck the defendant with his fist in the defendant's stomach.

Defendant testified that he replied nothing and that at this point Sergeant Hooper struck him again in the stomach, saying, "Did you hear me?" The defendant replied, "Yes, I heard you," and Sergeant Hooper said, "Well, then, answer me when I ask you something or say something to you." Transcript of Record, page 161. Sergeant Hooper said, "You are going to give me the answers that I want or I'm going to take you out there and work on you like that for the rest of the night." Transcript of Record, page 162.

Defendant then testified that Sergeant Gravante sat down beside him and said that Sergeant Hooper meant exactly what he said. The defendant testified that he told Sergeant Gravante that he would say anything they wanted him to say if they would then leave him alone, and Sergeant Gravante told him that he would get a pencil and

paper and let the defendant write it down, and the defendant thereupon began to write. Transcript of Record, page 162. Defendant testified that he thereupon wrote the document admitted to evidence at the trial as People's Exhibit 18, and that upon completion of this document he was taken to the home of the decedent at 1100 Samara Road and the questioning resumed wherein he was asked what his various actions had been at the time of the killing and what he had done with the knife, and what he had done with the car keys. Defendant testified that he told the officers that he had thrown the knife and the car keys away, and that he had told them this because he had no idea where either knife or car keys were, Transcript of Record, page 200, and that he had to give them some explanation of their absence in order to terminate their questioning of him. He testified that he told them that he had burned the clothing that he had been wearing the evening of July 4, and that he had told them this for the same reason.

Defendant further testified that on July 6, 1955, he was taken to the office of District Attorney S. Ernest Roll, that at the time of the conversation in District Attorney Roll's office, the following people were present: Sergeant Gotch, Sergeant Hooper, Lieutenant Armstrong, Officer Stambler, Chief Assistant Deputy District Attorney Alexander, Dr. Marcus Crahan, a stenographer and Mr. Roll. Transcript of Record, page 167.

The defendant testified that Mr. Roll commenced questioning him and the defendant told him that from the beginning of his interrogation by the police officers that he had requested an opportunity to consult with an attorney, and that he would now like to see an attorney before answering questions of Mr. Roll. Transcript of Record, page 168. Defendant testified that Mr. Roll informed him that

he could have a Public Defender when he got into court, and he, the defendant, testified that he wanted an attorney with him at that time. Whereupon Mr. Roll told the defendant that he would be permitted to make a telephone call to an attorney.

The defendant testified that at this point Mr. Roll had his secretary place a call to the office of Raymond C. Simpson, an attorney in Long Beach, California, and that after introductory remarks, the defendant was directed to an extension telephone in the same room at an adjoining desk to that of Mr. Roll and commenced a conversation with Mr. Simpson.

The defendant testified that this was not a private conversation, that all of the officers and District Attorney Roll and Chief Assistant Deputy District Attorney Adolph Alexander were present at the time of the telephone call. Transcript of Record, page 169. Defendant testified that Mr. Roll kept his telephone instrument to his ear during the time that the defendant was talking with Mr. Simpson on his instrument, and that Mr. Roll interrupted the telephone conversation two or three times. The defendant testified that he asked Mr. Simpson what he could do to make the officers stop using force on him, and that at this point Mr. Roll cut into the conversation and told Mr. Simpson that there had been no coercion used at all, and that everything the defendant had said was free and voluntary. Transcript of Record, page 169.

Mr. Raymond C. Simpson was called by the defendant as a witness on voir dire, was sworn and testified as follows: At about four o'clock in the afternoon he received a telephone call from a person who identified himself as District Attorney S. Ernest Roll, that Mr. Roll informed him that he had John Crooker in his office and asked Mr. Simpson if he knew John Crooker. Upon Mr. Simpson's

reply in the affirmative, Mr. Roll said that Mr. Crooker would like to talk to him, whereupon a voice came on the line and Mr. Simpson testified he recognized it as being that of John R. Crooker, a former student of his at Pepperdine College. Mr. Simpson testified that the defendant explained the nature of his difficulties and then asked the question, "How can I stop them from using force to make me answer questions?" At which time Mr. Roll, or the voice identified as his, interrupted and said, "Simpson, you know better that that. No force has been used by this office whatsoever, and Crooker knows better than that." Transcript of Record, page 221. Mr. Simpson further testified that Mr. Roll informed him that he had already taken a statement from the defendant, and further testified that he was informed that the first opportunity that he would have to see the defendant would be at the West Los Angeles Police Station at approximately 7:00 P.M., that evening. He further testified that he was not invited to come to the District Attorney's Office to participate in the interview that was at that time going on. Transcript of Record, page 222.

Upon cross-examination of Mr. Simpson by Chief Assistant Deputy District Attorney Adolph Alexander, Mr. Simpson was asked questions as follows beginning at Transcript of Record, page 223: "Mr. Simpson, directing your attention to the conversation you have testified to with Mr. Roll and Mr. Crooker, when you received this call on the afternoon of the 6th of July, is it not a fact that Mr. Roll said to you 'Simpson?' and you said, 'Yes, Mr. Roll, how are you?', and Roll said, 'Pretty good, I am sitting here with a young man who has been placed under arrest in connection with a murder up in Bel Air, John Russell Crooker, I think that is the way he pronounces it,' and you said, 'Oh yeah, a former student of mine.' And then Mr. Roll said, 'What?', and you said, 'He was a former student

of mine.' And then Mr. Roll said, 'Yes. He has asked me—we have tried to take his statement. He said he wanted to talk to you. I asked him if you'd represent him. He said that he would like to talk to you in connection with the matter.' And you said, 'Yes.' And Roll said, 'And he's here, and if you want to talk to him, why I'll put him on the phone and you can talk to him.' And you said, 'Thank you kindly.' And then Crooker said to you, 'Hello, Mr. Simpson,' and then you made some reply, and then Crooker said, 'Well, I am as well as can be expected. I have been in custody since yesterday about noon. And, I, of course, feel that I need—would like to have counsel at the earliest opportunity. I don't have much resources, and, of course, at the time that they take me before the court I understand that I have recourse to a public defender. However, if I could get an attorney at this point I am also given to understand that I can have representation at this time. And, of course, I have what I feel is a very reasonable interest in having that representation at this time. And I would like to ask you personally if you are at all inclined to take the job, and also I would like to ask you if you will—if you would make a recommendation to me.'" Transcript of Record, page 227.

Mr. Alexander's cross-examination of Mr. Simpson proceeded in this vein, with Mr. Alexander asking the witness if each of the statements were not the statements that were made on the telephone conversation to which the witness replied, to the best of his knowledge that they were. The questions asked by Mr. Alexander further indicated that there were four separate interruptions in the telephone conversation between Mr. Simpson and the defendant Crooker by District Attorney Roll, and the witness verified that these interruptions had in fact occurred. Transcript of Record, pages 227 to 230.

Lois R. Johnson was called as a rebuttal witness for the People in the voir dire inquiry, was sworn and testified that she was a court reporter, and that she had taken shorthand notes of the proceedings in District Attorney Roll's office on the afternoon of July 6, 1955. She further testified that at the time the telephone conversation between Simpson and Mr. Roll commenced that she had stopped taking notes as she had standing orders to the effect that she was not to type the contents of a telephone conversation. Transcript of Record, page 334. Out of the presence of the jury, Mr. Alexander admitted that the District Attorney's Office had caused a wire recording to be made of all proceedings that were had in Mr. Roll's office, and that it was the intent of the District Attorney's office to play the wire recording of all proceedings, including the three-way telephone conversation between Mr. Roll, Mr. Simpson, and the defendant, Crooker. Transcript of Record, page 341.

The officers involved were called and testified as follows:

Sergeant Gotch testified that he did not recall the defendant making any request for an attorney while kept at Central Station. Sergeant Gotch admitted that there had been a conversation about an attorney at that time and that the name of Ray Simpson was mentioned, and that Mr. Simpson was identified as a former instructor of the defendant at Pepperdine College; that the defendant had asked whether he would be allowed to consult with Mr. Simpson and Sergeant Gotch testified that he informed the defendant that he would be able to call an attorney "after our investigation was concluded." Transcript of Record, page 83.

Officer Willis was called and denied that the defendant stated that he would take the lie-detector test after allowed an opportunity to consult with counsel, but admitted that

there had been a conversation about an attorney while Crooker was in the Polygraph room and that the name of Mr. Simpson was mentioned and that Mr. Simpson was identified as an instructor at Pepperdine College. Transcript of Record, page 135. Inspector Kerr, Theodore B. Lay and Officer Stambler were called and testified that they did not recall the defendant having requested an opportunity to consult with an attorney.

Lieutenant Grover Armstrong was called and testified that the questioning at the West Los Angeles Police Station took place in his office; that this office contains sound-recording equipment, but that at the time of the questioning, the sound-recording equipment was not employed. An objection was sustained to the question as to why the sound-recording equipment had not been used. Transcript of Record, pages 237 and 238.

Sergeant Hooper was called and testified the defendant did not make a request for an attorney in his presence. Sergeant Hooper also denied that he had struck the defendant on the knee or hit the defendant in the stomach or that he used profane and obscene language in questioning the defendant or that he had made the statements as hereinabove set forth by the defendant that were attributed to him. Transcript of Record, pages 242 and 243.

Later in Sergeant Hooper's testimony, Sergeant Hooper denied that he had ever had a conversation with the defendant about an attorney, either in the initial interrogation or in the conversation in the District Attorney's office. However, the transcript of the proceedings in the District Attorney's office showed that there had been a conversation by Sergeant Hooper respecting an attorney at which time Sergeant Hooper had told the defendant that he would not need an attorney at that time, but that the first occasion that he would need an attorney would be when

he went to Court. It is significant that at the time of Sergeant Hooper's testimony that at no time had he had a conversation about an attorney (People's proposed Exhibit 29), the transcript of the proceedings in the District Attorney's office had been stricken from evidence and it was only after the Court had observed that he would not allow an untruthful witness to take sanctuary behind the ruling of the Court, that Sergeant Hooper reluctantly admitted, "I may have said that."

The defendant further testified that while in the District Attorney's office, he told Mr. Roll, the District Attorney, that Sergeant Hooper had hit him and said to Sergeant Hooper, "You hit me twice in the stomach," to which Sergeant Hooper replied, "I don't think we hurt you," and that the defendant repeated the accusation and again Sergeant Hooper replied, "I don't think we hurt you." This testimony of the defendant's was unrefuted at the trial although Sergeant Hooper, Sergeant Gotch, and Lieutenant Armstrong were all admittedly present in the District Attorney's office with the defendant. Transcript of Record, page 214.

The People called as a rebuttal witness on voir dire a Frank Rutherford who testified that he was a police reporter for the Los Angeles Herald-Express Newspaper and that in the early morning hours of July 6, he had stood on a ledge directly below Lieutenant Armstrong's office in order to hear portions of the conversation and that there were no raised voices and no profanity. Mr. Rutherford identified People's Exhibit 23, a diagram of the office, and testified that he was familiar with the premises and further identified the ledge to which he referred as being the ledge flanking the steps to the main entrance of the West Los Angeles Police Station. Transcript of Record, pages 263 and 264. It later developed that People's Exhibit 23

had been drawn erroneously and that the ledge on which Mr. Rutherford testified he was standing on to hear the conversation directly under Lieutenant Armstrong's office was, in fact, several offices away from the office where the conversation was actually going on and further pictures introduced by the defendant (Defendant's Exhibits C, D, E, F, and G) showed that there was no ledge underneath the office in which the interrogation was being conducted and that a witness standing where Mr. Rutherford testified that he was standing would have been physically incapable of hearing any conversation in the office. Transcript of Record, pages 415 to 417.

## POINT NO. 1

### Was the Defendant Denied Due Process of Law by the Refusal of the Investigating Officers to Allow Him to Consult With an Attorney Upon Demand Being Made to Do So While He Was in Custody?

The appellant is aware of the fact that there is a discrepancy between his version of the interrogation and that of the officers who testified in the case; however, this court has the right and the duty to make an independent examination of the circumstances leading up to the making up of a confession and this duty cannot be foreclosed by the finding of a court, the verdict of a jury, or both. *Ashcraft* v. *Tenn.*, 322 U.S. 143 and *Lisenba* v. *Calif.*, 314 U.S. 219.

The discrepancies mentioned above are, as the court said in the case of *Ashcraft* v. *Tenn.*,

> "The inescapable consequences of secret inquisitorial practices and always evidence concerning the inner details of secret inquisitions is weighted against an accused, particularly where, as here, he is charged with a brutal crime."

As the court said further in the *Ashcraft* case:

> "We think a situation such as that here shown by uncontradicted evidence is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear."

It is appellant's contention that this language is particularly applicable to the instant case on the basis of the admitted facts of what happened during the period of interrogation.

It is appellant's position here that the denial of defendant's request to consult with an attorney during a period of prolonged questioning of the defendant without presentation to a magistrate was a denial of due process to the defendant and that such a denial exists whether the coercion is physical or psychological. As was said by the court in the case of *Leyra* v. *Denno*, 347 U.S. 556, 74 SC 716:

> "We hold that the use of confessions extracted in such a manner from a lone defendant unprotected by counsel is not consistent with due process of law as required by our Constitution."

The peculiar need of the defendant for advice of counsel is shown by the peculiar circumstances in which the defendant found himself at the time of his arrest, charged with the murder of Mrs. McCauley. Appellant and the decedent had had an intimate relationship which had extended over a period of almost two years. The practical dilemma with which the defendant was confronted upon facing his inquisitors was whether he should admit to the secret, intimate relationship and thereby expose himself as a particularly likely suspect; or whether he should chance denying the intimate relationship in order to avoid

embarrassment and humiliation and present his position as a mere friend of the decedent with the risk that the officers would learn of the intimate relationship and thereby feel that his untruthfulness about the relationship was indicative of untruthfulness as to denials of her murder. This dilemma the appellant wished to place before an attorney and be advised as to proper procedure. As this court said in the case of *Chandler* v. *Fretag*, 348 U.S. 3, 75 S.Ct. 1, quoting with approval the language from *Powell* v. *Alabama*, 287 U.S. 45, 53 SC 55, 77 LED 158:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence . . . *he requires the guiding hand of counsel at every step in the proceedings against him.*" (Court's italics.)

The record herein discloses that during the time when counsel could have most effectively secured defendant's rights against deprivation, the officers of the state repeatedly refused to honor his request to consult with counsel of his own choice and selection. Defendant's need for legal advice was real, and his repeated requests to be allowed to consult an attorney cannot be assumed to have been other than in good faith. He was at the mercy of the police officers. They and they alone, although sworn to defend the Constitution, stood between defendant and his constitutional right to aid of counsel at the most critical phase of the entire proceedings. This, we submit, is not the due process of law which the Fourteenth Amendment assures.

In the recent case of *Mallory* v. *United States*, decided June 24, 1957, 77 S.Ct. 1356, this court held that much less

abusive and offensive conduct by police officers in a federal arrest constituted reversible error. The court pointed out that Mallory was not told of his right of counsel (nor was Crooker) or his right to preliminary examination before a magistrate, nor was he warned that he might keep silent, for that any statement made by him might be used against him. None of these safeguards were afforded the defendant in the instant case. As the court observed in the *Mallory* case:

> "Not until he had confessed, when any judicial caution had lost its purpose, did the police arraign him."

We submit that the more aggravated circumstances of the present case—in particular the denial of counsel—intensifies the infirmity from a procedural to a constitutional defect.

It is appellant's position here in light of this court's holdings in the *Leyra* case (*supra*), *Chandler* v. *Fretag* (*supra*), *Powell* v. *Alabama* (*supra*), *Chessman* v. *Teets*, 77 S.Ct. 1127 and *Mallory* v. *United States* (*supra*), that this court should announce a rule making the inquisitorial practices denounced in *Ashcraft* v. *Tenn.* (*supra*) so unprofitable to police officers that they will discontinue their use. Insistence upon reasonable opportunity to consult with counsel, when requested, during the pre-arraignment period will go far, we suggest, in forestalling such practices.

## POINT NO. 2

**Was the Defendant Denied Due Process of Law by the Admission Into Evidence of a Confession Which Was Taken From Him While in Custody and After He Had Been in Such Custody for Fourteen Hours and Had Not Been Allowed to Consult With His Attorney?**

It is the appellant's position here that the confession was erroneously admitted to evidence by the trial judge at the conclusion of the voir dire inquiry.

This voir dire examination required several days of trial time and at its conclusion, the court had before it the admitted facts as set forth under Point No. 1 of this brief and in spite of these facts the trial judge admitted the confession to evidence holding as he did so that as a matter of law the confession was an admissible piece of evidence subject to the weight and credibility given to it by the jury. Transcript of Record, page 300.

Having admitted it to evidence, the trial judge, at the time of instructing the jury, rejected the following instruction requested by the defendant:

"You are instructed that a defendant in a criminal case has the constitutional right to counsel at all stages of the proceeding. Refusal to grant the prisoner's request for counsel prior to arraignment constitutes a denial of fundamental civil rights. Should you find from the evidence in this case that the defendant made a request for counsel which was refused by the officers who had him in custody, then, in that event, I instruct you that People's Exhibit 18 in evidence, the written confession of the defendant, should be absolutely disregarded by you in determination of this case." Transcript of Record, page 716. Instead of the requested instruction, the court modified the defendant's requested instruction to read as follows:

"You are instructed that a defendant in a criminal case has a constitutional right to counsel at all phases of the proceedings. Refusal to grant the prisoner's request for counsel constitutes a denial of fundamental rights. Whether or not the defendant asked for counsel, and if he did, whether he was or was not denied an opportunity to consult with counsel, are circumstances you may consider, among others, in determining whether the written confession was voluntary or involuntary." Transcript of Record, page 709.

After the jury had retired to deliberate upon a verdict, the foreman sent a note to the trial judge and in response to the note, the jury were summoned back into the court room and the following proceedings were had:

SANTA MONICA, CALIFORNIA—THURSDAY,
DECEMBER 8, 1955
5:20 O'CLOCK P.M.

The Court: "Let the record show the jury is present and representatives of the People, counsel for the defendant, and the defendant are present. I want the record to show that the Court received a note from a juror, signed by Clarence Richmond as foreman, in which a question of law, and the Court sent the note back to the jury. I want to suggest that if at any time during the proceedings you have questions on points of law, the proper way is to let the bailiff know and he in turn will have you escorted out here and I will give you instructions on the law in open court where everyone has the opportunity to hear it.

As I recall the question you did ask in that note, it was to the effect that if you, as jurors, should believe that the defendant did request counsel, and if you should believe that he was denied the opportunity of counsel, must you necessarily exclude the consideration of the written confession, or may you nevertheless

consider the written confession, and whether or not it was voluntary.

Now on this point I will re-read portions of two of my instructions on that subject. The Court gave this instruction No. 21:

You are instructed that a defendant in a criminal case has a constitutional right to counsel at all stages of the proceedings. Refusal to grant a prisoner's request for counsel constitutes a denial of fundamental rights. Whether or not the defendant asked for counsel, and if he did whether he was or was not denied an opportunity to consult with counsel are circumstances you may consider among others in determining whether the written confession was voluntary or involuntary.

And then the last portion of Instruction No. 20 reads as follows:

If a confession is made when the accused is under arrest and is being detained, or when he is not represented by counsel, or when he has not been told that any statements he might make will or may be used against him, such circumstances in and of themselves do not make the confession involuntary, but all the facts connected with the making of a confession, if one was made, including any such as I have mentioned, ought to be considered by you in determining whether or not the confession was voluntary." Transcript of Record, pages 709 and 710.

The only possible inference to be drawn from the jury's question is that they had determined the issue presented at the trial as to whether or not the defendant had in fact requested counsel while he was in custody in the defendant's favor. This being so, the defendant was entitled to have the jury instructed in accordance with the principle of law

that when a right is conferred by law everything necessary to the protection of that right is also conferred.

The complained of modification of defendant's requested instruction (Court's Instruction No. 21) converted the guarantee of the Fourteenth Amendment of the Constitution to a mere token and sham.

The issue as to whether or not the defendant had requested counsel while he was in custody and whether or not it had been denied to him was one of the principal issues of the trial and consumed several days of trial time with numerous witnesses being called by both the prosecution and the defense. The defendant's statements in this regard were contested by the people throughout. The question as posed by the jury indicated that this prime issue of the trial had been determined in the defendant's favor. It was appellant's position at the trial and it is appellant's position before this court that the trial court converted defendant's prevailing position into a Cadmean victory.

It is appellant's position before this Honorable Court that refusal to grant a prisoner's request for counsel constituted a denial of fundamental civil rights granted by the Fourteenth Amendment to the United States Constitution and that the admission into evidence of a confession obtained while the defendant was being held without being allowed to consult with counsel carried forward the denial of due process of law into the trial itself.

As this Court said in the case of *Lisenba* v. *Calif.*, 314 U.S. 219 at 236, 62 S.Ct. at page 290:

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concepts of justice. In order to declare a denial of it, we must find that the absence of that fairness fatally infected the trial; the action com-

plained of must be of such quality as necessarily prevents a fair trial. Such an unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt. We have so held in every instance in which we have set aside for want of due process a conviction based on a confession."

This Court also said in the case of *Glasser* v. *United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680:

"The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

This Court has held that where a verdict of conviction does not show whether it is based on evidence properly admitted or evidence that offended the due process clause, a conviction cannot stand. In the case of *Williams* v. *North Carolina,* 317 U.S. 287 at 292. This court said:

"To say that a verdict of guilty should be upheld though we cannot know whether it cannot rest on the invalid constitutional ground on which the case was submitted to the jury would be to countenance a procedure which would cause a serious impairment of constitutional rights."

To same effect see *Stromberg* v. *People of the State of Calif.,* 282 U.S. 59 at 368 and *Bram* v. *United States,* 118 U.S. 530 at 540 and *Lyons* v. *People of the State of Oklahoma,* 322 U.S. 596. This court held that if an involuntary confession is admitted into evidence whether other evidence is sufficient to justify the verdict or not, the court will not consider the other evidence, for if the "admission of this evidence" denied a constitutional right to defendant, the error requires reversal.

It is significant to note that in the instant case the People relied almost entirely upon the confession. There is virtually no other evidence to support a verdict of guilt against this defendant.

The only evidence that tended to place the defendant at the scene of the crime was the testimony of a taxi driver that he had taken Crooker to the defendant's home at five-thirty o'clock in the afternoon on the 4th of July, Transcript of Record, page 62, which was at least eight to ten hours prior to the established time of her death. The murder weapon was never found. The car keys which the police had made a great effort to find and which the defendant testified he had made reference to in his confession at the instigation of the police officers, Transcript of Record, page 514, were later found to have been in the possession of the decedent's brother all the time, he having absent-mindedly picked them up in the kitchen, Transcript of Record, page 57, where the decedent's escort of the evening before testified he had laid them upon returning the decedent to her home.

Not only was there no other evidence connecting the defendant with the crime but there were extremely suspicious circumstances surrounding the testimony of other persons.

The maid who had been employed only five days before the death of Mrs. McCauley, Transcript of Record, page 19, testified that when the five year old child of the decedent came to her and said, "Mommy is in a mess," Transcript of Record, page 15; that she went to the door of Mrs. McCauley's bedroom, Transcript of Record, page 15, and observed Mrs. McCauley on the floor with her head and shoulders resting on the chaise lounge, Transcript of Record, page 16, and that she did not believe that Mrs. McCauley was dead, Transcript of Record, page 16, but testified that she thought Mrs. McCauley had hemorrhaged. However, she testified that she did not call out to Mrs.

McCauley and inquire of her what was the matter, Transcript of Record, page 36, that she did not go over to Mrs. McCauley to see if she could be of assistance to her, Transcript of Record, page 31, but that instead she brought the five year old child of Mrs. McCauley back into the room, Transcript of Record, page 31, and had the child pick up some keys that were scattered on the floor and put them in a purse, Transcript of Record, page 32, and place the purse upon the bed. Transcript of Record, page 35. She testified that she (the maid) at no time touched anything in the room. Transcript of Record, page 32.

This same witness also testified that she was able to hear the telephone ring at night, Transcript of Record, page 23, and testified positively that on the night of the murder the telephone had not rung. Transcript of Record, pages 22 and 23. Other evidence in the case proved that the telephone had rung over twenty times, Transcript of Record, page 428, and that Mrs. McCauley had had at least one conversation after her escort of the evening had left and prior to her death. Transcript of Record, page 434.

The evidence also disclosed that the contents of Mrs. McCauley's stomach showed eight ounces of partially digested food, Transcript of Record, page 5, although her last meal known to have been consumed was five and one-half hours prior to her death, Transcript of Record, page 12, and the expert witness physician testified that he did not expect to find any residue in the stomach from food consumed that long prior to the death. Transcript of Record, page 10.

The prosecution attempted to prove by introduction into evidence of a photograph of John Crooker that he had scratches upon his person, particularly upon his neck that were inflicted by the decedent. An expert witness called by the defendant testified in answer to a hypothetical question that if the decedent had scratched her assailant in a

manner to leave a mark such as shown in the photograph that he would expect to find pieces of skin beneath her fingernails. Transcript of Record, page 694. The fingernails of the decedent had been examined by the Los Angeles Police Department Crime Lab and their findings were negative. Transcript of Record, page 669.

The expert called by the defendant testified that the blood on the drapes which was spattered over an area from floor level to a height of six feet would indicate a struggle and that in his opinion such a spattering of blood would not be made by the simple withdrawal of a knife from a prone victim. Transcript of Record, page 697. No effort was made by the Los Angeles Police Department Crime Lab to type the blood found on the drapes to ascertain if the killer's blood was on the drapes in addition to the decedent's and the drapes were sent to the laundry and cleaned without opportunity to examine them.

Evidence, introduced by the People, showed that a great deal of blood had spattered all over the room in which the decedent was murdered and an examination of the defendant's personal effects and automobile were made in an attempt to find the presence of blood and the expert testified that the tests were such that if blood were present in the amount of one unit out of 300,000 units, it could be detected. Transcript of Record, page 664. Yet no evidence of blood was found on the person of the defendant, or in the automobile in which he admittedly had driven home on the night that Mrs. McCauley was murdered. Transcript of Record, page 673.

The evidence further showed that the decedent had had an arrangement with a neighbor by the name of Marilyn Low, whereby the two women had agreed that if one called the other during the night time hours and pretended to break a luncheon engagement that the one called would know by this code arrangement that the caller was in

trouble and would immediately summon the police. Transcript of Record, page 629.

Although the decedent had expressed to friends of hers a fear of John Crooker and although Marilyn Low was at home on the night of the murder, no telephone call was received by Mrs. Low from Norma McCauley, Transcript of Record, page 630, nor did Mrs. McCauley inform the person from whom she received a telephone call after her escort had left her home that she was in any danger or avail herself in any way of this means of sounding an alarm, Transcript of Record, page 434, although if the confession were true, John Crooker would have been with the decedent at the time she received this telephone call.

The foregoing is mentioned here by way of showing this court that there was ample reason for the jury to have found the defendant not guilty of the crime had it not been for the admission into evidence of the confession.

We submit that *Fikes* v. *Alabama*, 77 S.Ct. 281, requires a reversal of the present conviction. Although the duration of the interrogation, without arraignment, was longer there, the present case shows a more serious deprivation of constitutional rights. Here the defendant required, and repeatedly requested permission to obtain advice of counsel in order to ascertain how to properly answer police questions, and how to adequately resist the use of physical and psychological pressure. Timely advice of counsel might well have prevented defendant's will to resist from being overborne. Here, as in countless other similar cases, the always troublesome problem of the allegedly coerced confession—with its overtones of deliberate perjury on one side or the other—would in all probability never have arisen had defendant's request for counsel during the interrogation period been honored. We submit that the constitutional right to consultation with and advice of counsel means little if such a request can be denied with impunity. To

allow admission into evidence of a confession secured in the face of such a denial will only serve to strengthen the hand of the policeman and weaken one of the most important constitutional protections of the innocent. We submit that this Court should declare that any confession, obtained during a period of detention in which defendant has been denied the right to consult with counsel of his own choice within a reasonable time after request to do so has been made, is constitutionally inadmissible in evidence irrespective of whether it is shown to be voluntary or involuntary. In any event, under the circumstances here established, the use of defendant's confession should be held a denial of due process.

On the basis of the authorities cited herein, petitioner earnestly contends before this Honorable Court that the first question, "Was the defendant denied due process of law by the refusal of the investigating officers to allow him to consult with an attorney upon demand being made to do so while he was in custody?" must be answered in the affirmative. This being so, the second question must necessarily be answered affirmatively also. To do otherwise would amount to giving approval to lawless acts and to allow police officers to profit by their wrongs. In the instant case, the wrongdoing of the police officers constituted coercion. The coercion constituted an unfairness to the defendant in derogation of his rights under the 14th Amendment to the Constitution that necessarily prevented him from having a fair trial. The unfairness "fatally infected the trial" according to the test set forth in *Lisenba* v. *Calif.*, 314 U.S. 219 (*supra*) and the Constitutional guarantees demand that this conviction be reversed.

Respectfully submitted,

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